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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 TINYBUILD LLC,

10
11 Plaintiff,

12 v.

13 NIVAL INTERNATIONAL LIMITED,

14 Defendant.

CASE NO. C19-805 TSZ

**MODIFIED MODEL
PROTECTIVE ORDER**

15 1. PURPOSES AND LIMITATIONS

16 Pursuant to the Minute Order entered November 7, 2019, docket no. 28, the Court enters
17 this Protective Order, which tracks the district's model form, but adds a provision permitting the
18 parties to designate materials as "Attorney's Eyes Only." This Protective Order does not confer
19 blanket protection on all disclosures or responses to discovery. The protection it affords from
20 public disclosure and use extends only to the limited information or items that are entitled to
21 confidential treatment under the applicable legal principles, and it does not presumptively entitle
22 parties to file "confidential" or "Attorney's Eyes Only" information under seal.

23 2. "CONFIDENTIAL" MATERIAL

24 Documents and tangible things produced in discovery may be designated as "confidential"
25 or "Attorney's Eyes Only," as appropriate.
26

1 3. SCOPE

2 The protections conferred by this Protective Order cover not only confidential material (as
3 defined above), but also (1) any information copied or extracted from confidential material; (2) all
4 copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
5 conversations, or presentations by parties or their counsel that might reveal confidential material.

6 However, the protections conferred by this Protective Order do not cover information that
7 is in the public domain or becomes part of the public domain through trial or otherwise.

8 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

9 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
10 or produced by another party or by a non-party in connection with this case only for prosecuting,
11 defending, or attempting to settle this litigation. Confidential material may be disclosed only to the
12 categories of persons and under the conditions described in this Protective Order. Confidential
13 material must be stored and maintained by a receiving party at a location and in a secure manner
14 that ensures that access is limited to the persons authorized under this Protective Order.

15 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered
16 by the court or permitted in writing by the designating party, a receiving party may disclose any
17 confidential material only to:

18 (a) the receiving party’s counsel of record in this action, as well as employees
19 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

20 (b) the officers, directors, and employees (including in house counsel) of the
21 receiving party to whom disclosure is reasonably necessary for this litigation, unless the particular
22 document or material produced is designated for “Attorney’s Eyes Only”;

23 (c) experts and consultants to whom disclosure is reasonably necessary for this
24 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

25 (d) the court, court personnel, and court reporters and their staff;
26

1 (e) copy or imaging services retained by counsel to assist in the duplication of
2 confidential material, provided that counsel for the party retaining the copy or imaging service
3 instructs the service not to disclose any confidential material to third parties and to immediately
4 return all originals and copies of any confidential material;

5 (f) during their depositions, witnesses in the action to whom disclosure is
6 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
7 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
8 transcribed deposition testimony or exhibits to depositions that reveal confidential material must
9 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
10 under this Protective Order;

11 (g) the author or recipient of a document containing the information or a
12 custodian or other person who otherwise possessed or knew the information.

13 4.3 Filing Confidential Material. Before filing confidential material or discussing or
14 referencing such material in court filings, the filing party shall confer with the designating party,
15 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
16 remove the confidential designation, whether the document can be redacted, or whether a motion
17 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
18 designating party must identify the basis for sealing the specific confidential information at issue,
19 and the filing party shall include this basis in its motion to seal, along with any objection to sealing
20 the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be followed and
21 the standards that will be applied when a party seeks permission from the court to file material
22 under seal. A party who seeks to maintain the confidentiality of its information must satisfy the
23 requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion to seal.
24 Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with
25 the strong presumption of public access to the Court’s files.
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1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
3 or non-party that designates information or items for protection under this Protective Order must
4 take care to limit any such designation to specific material that qualifies under the appropriate
5 standards. The designating party must designate for protection only those parts of material,
6 documents, items, or oral or written communications that qualify, so that other portions of the
7 material, documents, items, or communications for which protection is not warranted are not swept
8 unjustifiably within the ambit of this Protective Order.

9 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
10 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
11 unnecessarily encumber or delay the case development process or to impose unnecessary expenses
12 and burdens on other parties) expose the designating party to sanctions.

13 If it comes to a designating party's attention that information or items that it designated for
14 protection do not qualify for protection, the designating party must promptly notify all other parties
15 that it is withdrawing the mistaken designation.

16 5.2 Manner and Timing of Designations. Except as otherwise provided in this
17 Protective Order (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated
18 or ordered, disclosure or discovery material that qualifies for protection under this Protective Order
19 must be clearly so designated before or when the material is disclosed or produced.

20 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
21 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
22 the designating party must affix the word "CONFIDENTIAL" or the phrase "ATTORNEY'S
23 EYES ONLY" to each page that contains "confidential" or "Attorney's Eyes Only" material. If
24 only a portion or portions of the material on a page qualifies for protection, the producing party
25 also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the
26 margins).

1 (b) Testimony given in deposition or in other pretrial proceedings: the parties
2 and any participating non-parties must identify on the record, during the deposition or other pretrial
3 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
4 after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the
5 transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
6 exhibits thereto, as confidential. If a party or non-party desires to protect confidential information
7 at trial, the issue should be addressed during the pre-trial conference.

8 (c) Other tangible items: the producing party must affix in a prominent place
9 on the exterior of the container or containers in which the information or item is stored the word
10 “CONFIDENTIAL” or the phrase “ATTORNEY’S EYES ONLY,” as appropriate. If only a
11 portion or portions of the information or item warrant protection, the producing party, to the extent
12 practicable, shall identify the protected portion(s).

13 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
14 designate qualified information or items does not, standing alone, waive the designating party’s
15 right to secure protection under this Protective Order for such material. Upon timely correction of
16 a designation, the receiving party must make reasonable efforts to ensure that the material is treated
17 in accordance with the provisions of this Protective Order.

18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
20 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
21 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
22 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
23 challenge a confidentiality designation by electing not to mount a challenge promptly after the
24 original designation is disclosed.

25 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
26 regarding “confidential” or “Attorney’s Eyes Only” designations without court involvement. Any

1 motion regarding “confidential” or “Attorney’s Eyes Only” designations or for a protective order
2 must include a certification, in the motion or in a declaration or affidavit, that the movant has
3 engaged in a good faith meet and confer conference with other affected parties in an effort to
4 resolve the dispute without court action. The certification must list the date, manner, and
5 participants to the conference. A good faith effort to confer requires a face-to-face meeting or a
6 telephone conference.

7 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
8 intervention, any party may file and serve a motion under Local Civil Rule 7 (and in compliance
9 with Local Civil Rule 5(g), if applicable). The burden of persuasion in any such motion shall be
10 on the designating party. Frivolous designations or challenges, and those made for an improper
11 purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties), may expose
12 the designating or challenging party to sanctions. All parties shall continue to maintain the material
13 in question as “confidential” or “Attorney’s Eyes Only” until the Court rules on the challenge.

14 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
15 LITIGATION

16 If a party is served with a subpoena or a court order issued in other litigation that compels
17 disclosure of any information or items designated in this action as “CONFIDENTIAL” or
18 “ATTORNEY’S EYES ONLY,” that party must:

19 (a) promptly notify the designating party in writing and include a copy of the
20 subpoena or court order;

21 (b) promptly notify in writing the party who caused the subpoena or order to
22 issue in the other litigation that some or all of the material covered by the subpoena or order is
23 subject to this Protective Order. Such notification shall include a copy of this Protective Order;
24 and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued by
26 the designating party whose confidential material may be affected.

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
3 material to any person or in any circumstance not authorized under this Protective Order, the
4 receiving party must immediately (a) notify in writing the designating party of the unauthorized
5 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,
6 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
7 this Protective Order, and (d) request that such person or persons execute the “Acknowledgment
8 and Agreement to Be Bound” that is attached hereto as Exhibit A.

9 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
10 MATERIAL

11 When a producing party gives notice to receiving parties that certain inadvertently
12 produced material is subject to a claim of privilege or other protection, the obligations of the
13 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision
14 is not intended to modify whatever procedure may be established in an e-discovery order or
15 Protective Order that provides for production without prior privilege review.

16 10. NON TERMINATION AND RETURN OF DOCUMENTS

17 Within 60 days after the termination of this action, including all appeals, each receiving
18 party must return all “confidential” and “Attorney’s Eyes Only” material to the producing party,
19 including all copies, extracts and summaries thereof. Alternatively, the parties may agree upon
20 appropriate methods of destruction.

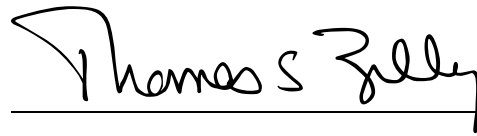
21 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
22 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
23 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work
24 product, even if such materials contain “confidential” or “Attorney’s Eyes Only” material.

25 The confidentiality obligations imposed by this Protective Order shall remain in effect until
26 a designating party agrees otherwise in writing or a court orders otherwise.

1 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
2 documents in this proceeding shall not, for the purposes of this proceeding or any other federal or
3 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
4 documents, including the attorney-client privilege, attorney work-product protection, or any other
5 privilege or protection recognized by law.

6 IT IS SO ORDERED.

7 DATED this 7th day of November, 2019.

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11 Thomas S. Zilly
12 United States District Judge
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1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of
5 perjury that I have read in its entirety and understand the Protective Order, docket no. 29, that was
6 issued by the United States District Court for the Western District of Washington on November 7,
7 2019, in the case of *tinyBuild LLC v. Nival International Limited*, Case No. C19-805 TSZ. I agree
8 to comply with and to be bound by all the terms of this Protective Order and I understand and
9 acknowledge that failure to so comply could expose me to sanctions and punishment in the nature
10 of contempt. I solemnly promise that I will not disclose in any manner any information or item
11 that is subject to this Protective Order to any person or entity except in strict compliance with the
12 provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Western District of Washington for the purpose of enforcing the terms of this Protective Order,
15 even if such enforcement proceedings occur after termination of this action.

16 Date: _____

17 City and State where sworn and signed: _____

18 Printed name: _____

19 Signature: _____